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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARGARET M. HECKLER,
SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES

Petitioner,

v.

LEON S. DAY, et al.

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF AMICI CURIAE OF THE ALLIANCE OF SOCIAL SECURITY DISABILITY RECIPIENTS, THE GRAY PANTHERS, THE OLDER WOMEN'S LEAGUE, THE LUPUS FOUNDATION OF AMERICA, AND THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN IN SUPPORT OF APPELLEES' POSITION

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BRIEF AMICI CURIAE

INTERESTS OF AMICI ORGANIZATIONS

Pursuant to Supreme Court Rule 36, counsel for the petitioner and the respondents have consented to the filing of this brief amici curiae. Their letters of consent have been filed with the Clerk of the Court.

The Alliance of Social Security Disability Recipients is an organization founded to serve disability applicants and recipients. The Alliance was formed by disability recipients, their family members and concerned citizens in response to the harsh, unfair, and illegal denials and terminations of disabled Americans by the Social Security Administration (SSA). Five members of the Alliance have died after SSA denied or terminated their benefits. The Alliance is aware of at least twelve more deaths and great suffering in thousands of individuals' lives as a result of SSA's actions. At this time, the Alliance has approximately 3,000 members in eighteen states.

The Gray Panthers is a national organization comprised of approximately 40,000 individuals who reside throughout the United States. "Dedicated to helping the Nation's elderly," Schweiker v.

Gray Panthers, 453 U.S. 34, 40 (1981), its members seek to reform and improve various laws and institutions which affect the lives of the nation's elderly, many of whom are disabled.

The Older Women's League is the first grass-roots membership organization to focus exclusively on the concerns of mid-life and older women. The Older Women's League (OWL) works for policy changes to reduce the inequities faced by older women. Founded following the White House Mini-Conference on Older Women, OWL has 7,000 members nationwide and chapters in thirty states. Over 900,000 women receive Social Security disability benefits as disabled workers. 75% of these women are between ages 50-64.*

The Lupus Foundation of America

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*"Annual Statistical Supplement," Social Security Bulletin (1981).

is a private non-profit organization comprised of over 22,000 members. The Foundation was created in order to improve the standard of care and treatment of those individuals who suffer from lupus erythematosus. Lupus erythematosus is a disease of the immune system that often affects the kidney, brain, lungs, joints, and/or skin. One of the major goals of the Lupus Foundation of America is to work for the provision of programs and services that will directly improve the quality of life of all those who have the disease.

The American Association of University Women (AAUW) is an organization of 194,000 college-educated women which was formed over one hundred years ago to open the doors of education and broaden the opportunities available to women. Obstacles still exist that prevent women, minorities and the handicapped from obtaining a complete education

and gainful employment - a fact made apparent by the poverty statistics that put these groups at the bottom of the economic ladder. AAUW is therefore keenly aware of the additional hardships forced upon these segments of our population by unfair and unreasonable requirements made of applicants and recipients of the Social Security Disability Insurance program by SSA.

SUMMARY OF ARGUMENT

Section 205(b) of the Social Security Act, 42 U.S.C. §405(b), requires that the Secretary provide "reasonable notice and an opportunity for a hearing" when an appeal from a denial or termination of benefits is filed. It is amici's position that in order to properly assess what is a "reasonable" time frame for administratively processing Social Security disability appeals, the Court must focus both on who the appellants are and the effects of delay in their lives as well

as the interests of the administrative agency. These same factors must be considered in assessing the appropriateness of the remedy provided by the district court. This brief provides the Court with the human data needed to fully evaluate the merits of this case.

It is the purpose of this brief to make the following three points:

1. In the context of assessing what is a "reasonable" time for processing administrative appeals in the Social Security disability insurance ("DI") program, 42 U.S.C. §405(b), this Court must focus upon the extreme physical, emotional and financial hardships which delays in the administrative appeals process are creating in the lives of the disabled appellants.

2. The reliability and accuracy of the Secretary's decisions have decreased dramatically in recent years. This decrease in quality has exacerbated

the problems with administrative delays already existing in the appeals process. Contrary to the Secretary's representations to this Court, the delays are not "such an entrenched feature - and direct and foreseeable consequence - of the conscientious implementation of the Social Security Act by Congress and the Secretary," that it would be "inconceivable" that they "could be found to violate that very Act." (App. Br. p. 33; see also p. 16).

3. Finally, amici take issue with the Secretary's statement that Congress never approved of interim benefits in the DI program "based solely on the passage of time." (App. Br. p. 18) "Passage of time" and the havoc it wreaks with the disabled worker's life is precisely the problem which the Congress sought to address in Section 2, P.L. 97-455; 42 U.S.C. §423(g).

I. Without disability benefits, the disabled are without the economic, physical and emotional wherewithal to escape "the very margin of subsistence." Administrative delays in obtaining or restoring benefits significantly exacerbate their difficulties.

Contrary to the appellant's representations, amici believe that the administrative appeals procedures are not "prescribed in meticulous detail" [App. Br. p. 2], nor "carefully considered and pervasively regulated" [App. Br. p.14]. It is a system which appears to be completed regulated. Instead the procedures regulate only the entry of the claimant into the process and place time restraints upon the claimant's appeal of his claim.[1/] Nothing in the

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[1/] In the Title II program, there are five levels of review: initial decision, reconsideration, administrative law judge, Appeals Council, federal court. See 20 C.F.R. §404.900(a). At each level of review, the claimant or beneficiary who disagrees with SSA's decision must appeal to the next level of review with-

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current scheme addresses or attempts to consider the severe economic and emotional needs of the appellant whose case becomes stranded in the administrative process for several months, often well over a year. Similarly, the Secretary's brief fails to address these needs.

The delays faced by disabled individuals appealing a denial of an application or a decision to terminate benefits vary significantly. While only 33.2% of the appeals were disposed of within 120 days (four months), over 5%

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in sixty (60) days of the agency's last decision. See 20 C.F.R. §§404.909(a)(1) [request for reconsideration must be filed within 60 days of receipt of initial determination]; 404.933(a)(1) [request for hearing before ALJ must be filed within 60 days of receipt of ALJ decision]; 404.968(a)(1) [request for Appeals Council review must be filed within 60 days of receipt of ALJ decision]; 42 U.S.C. §405(g) [complaint for judicial review must be filed within 60 days of Secretary's final decision]. These are the only time frames imposed in the administrative appeals process. The Secretary imposes none on herself.

did not receive decisions until later than 345 days (over eleven months). At least 25% waited longer than 210 days for a decision.[2/]

Senator William Armstrong, chair of the Social Security Subcommittee of the Finance Committee, has described the continuation of benefits[3/] during appeal as "a life preserver" to disability recipients "cut off from federal aid -- their true lifeline -- and left to drift while they appeal the decision..."[4/] Citing a 60% reversal rate at the ALJ level on CDI termination cases, Armstrong further stated, "Clearly, many in need are being

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[2/] "Key Workload Indicators, FY '83," (May 1983), page 6.

[3/] P.L. 97-455, Section 2, discussed at pages 42-48, infra.

[4/] "News from Bill Armstrong, U.S. Senator from Colorado," September 28, 1982.

wrongly bumped from the rolls. Continuing benefits during appeal will go a long way toward halting unfair disruptions in the lives of our disabled."[5/]

In Mathews v. Eldridge, 424 U.S. 319 (1975), this Court distinguished the circumstances of welfare recipients in Goldberg v. Kelly, 397 U.S. 254 (1970), from those of a DI recipient stating that "welfare assistance is given to persons on the very margin of subsistence." 424 U.S. at 340. While "the hardship imposed upon the erroneously terminated disability recipient may be significant," this Court believed that "the disabled worker's need is likely to be less than that of a welfare recipient." Id. at 342. Unfortunately, when put to the test in recent years, these distinctions have not been borne out. Whatever differences may exist initially for some

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[5/] Id.

fade quickly as the disabled appellant becomes stranded in the SSA bureaucracy.

In 1981, the average monthly benefit amount paid to disabled men was $454.20 while women received an average benefit of $328.40.[6] In that same year, the federal poverty level for an individual was $4,360.[7] While the average annual benefit for disabled men exceeded this figure ($5,450), the average annual benefit for disabled women was below the poverty level. ($3,940).

Loss of benefits affects not only the disabled worker but also his or her family. In 1981, 1,070,000 children under the age of 18 were receiving DI benefits on their disabled parents' accounts.[8] 32,664 disabled children over age 18 were

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[6] "Annual Statistical Supplement, 1981," Social Security Bulletin, Table 95.

[7] Id., page 2.

[8] Id., Table 100.

dependent on their disabled parents' benefits.[9] Further, 428,212 spouses of disabled workers received benefits in 1981. Of those, 351,820 were entitled to benefits due to the presence of children under age 18 or of a disabled child over age 18.[10] 74,403 received benefits because they were over age 62.[11]

In 1979, the average age of disabled workers in current-pay status was

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[9] Id.

[10] Effective August 1, 1981, the mother is only eligible so long as the child is younger than 16. 42 U.S.C. §402(s)(1). Public Law 97-35. "Annual Statistical Supplement, 1981," Social Security Bulletin, Table 98.

[11] Id. The benefits available to a disabled worker and his or her family are limited to the smaller of "(A) 85 percent of such individual's average indexed monthly earnings (or 100 percent of his primary insurance amount, if larger), or (B) 150 percent of such individual's primary insurance amount." 42 U.S.C. §403(a)(6). As a result of this ceiling on the amount of benefits, a disabled wage earner with a family receives only slightly more than an individual disabled worker would receive.

52.9 years for men and 53.7 years for women.[12] 57% of the men and 60.4% of the women receiving DI benefits were between the ages of 55 through 64 years.[13]

While there may be some DI beneficiaries who receive income from other sources, most DI recipients do not. An analysis reported in 1980 based upon a special study of the disabled in 1972 found that 56.1% of the disabled received no income other than DI.[14] Of the remainder who did receive another benefit, 21% received Veterans' benefits; 8.9% private employer pension;[15] 6.4%

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[12] Id., Table 97.

[13] Id.

[14] Muller, "Receipt of Multiple Benefits by Disabled Worker Beneficiaries," Social Security Bulletin, Vol. 43, No. 11, pp. 3-19 (November 1980).

[15] As many private pension plans base eligibility for their disability benefits upon receipt of Social Security DI benefits, termination of DI benefits often results in loss of this second source of income as well.

disabled welfare benefits (pre-SSI); 3.8% government pension; 3.5% workers' compensation; 2.7% other public assistance; 2.0% private insurance; 1.2% Aid to Families with Dependent Children; .4% Railroad Retirement; and .4% temporary disability insurance.[16/] However, even these figures, if applied to 1983, exaggerate the income available to the minority of DI recipients who are fortunate enough to receive other benefits. In 1981, the Congress enacted §2208(a)(2) to (4) of P.L. 97-35, 42 U.S.C. §424a, which imposed a "cap" on the amount of benefits which a DI recipient could receive from almost any source.[17/] As a

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[16/] Muller, see fn. 14, supra, Table 9.

[17/] 42 U.S.C. §424a was expanded to provide for offset of not only workers' compensation against the DI benefit, but also offset of other disability benefits provided by federal, state and local governments. The offset does not

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result, a DI recipient who has additional benefit sources cannot receive more than 80% of their previous average current earnings. 42 U.S.C. §424a(6).

Many states do not have general relief programs.[18] As a result, a person terminated from DI will often not

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apply to Veterans' benefits, "benefits payable under a program of assistance which is based on need" and "benefits under a law or plan of the United States based on service all or part of which is employment" as defined under the Social Security Act. 42 U.S.C. §424a(2)(B). The result of the offset is to limit further the benefits available to the disabled worker and his/her family. The offset applies to the extent that the total benefits available to the worker and his family exceed 80% of his prior average current earnings. 42 U.S.C. §424a(6).

[18] Based upon the most recent data available from HHS, 32 of 54 jurisdictions (including Guam, Virgin Islands, and the Northern Marianas), provided no or very limited general assistance in specified situations. Characteristics of General Assistance in the United States, Department of Health, Education and Welfare (1978) at 134.

have any source of income.[19] Senator Carl Levin described the plight of a disabled beneficiary residing in Alabama, which does not provide general assistance:

> One such person is the 58-year-old woman from Phoenix City, Ala., with 40 years of work experience

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[19] In addition to loss of income, if the DI recipient has been eligible to receive DI for at least two years, he/she also receives Medicare benefits. Loss of health coverage for those who are, by definition, ill, raises serious problems. First, it is often impossible to obtain needed medical care without payment if the Medicare card is no longer available. Second, "In many instances, Medicare eligibility is absolutely essential as it is nearly impossible for disability recipients to receive adequate medical insurance because of high premiums or outright refusal by the insurance carrier." Statement of Senator Sasser, Congressional Record, p. S 7289 (June 22, 1982) Third, retroactive reinstatement of coverage when an appeal is won is wholly unsatisfactory. It is impossible in December to provide the health care that was needed in March. In all likelihood, where medical care could not be obtained, the person's condition will have deteriorated by the time of restoration of benefits. Finally, even those states which provide some form of general relief often do not provide a medical assistance program for non-Medicaid eligible individuals.

> as a presser and a domestic... Two years ago, she was placed on disability because of controlled hypertension - despite heavy medication - arthritis, heart complications, obesity, and severe asthma. [Her benefits were terminated. She appealed and won.] However, this severely disabled woman has gone 9 months without benefits. To date, restored benefits have not been received. She has lived on a $130 a month VA pension which she receives as a result of her husband's death. There is no general assistance program in Alabama. She is too young for SSI for the aged and has no young offspring living with her - therefore, she cannot qualify for AFDC. Her struggle to survive during such economic strife has only seemed to worsen her condition..."
>
> Statement of Senator Levin, Congressional Record, p. S 15103-4 (December 11, 1981)

SSI benefits will not be available because that program includes the same definition of disability as the DI program. See 42 U.S.C. §1382c(a)(3). And, even where welfare benefits may be available, courts have recognized that the disabled beneficiary remains in dire straights. See Chagnon v. Schweiker,

560 F.Supp. 71,74 (D.Vt. 1982) [The court held that the record supported plaintiffs' position that "claimants forced to undergo lengthy delays often suffer severe hardship" while trying to survive on general relief, food stamps and the charity of friends.][20/]

There is little information which assesses what resources, aside from income, might be available to the disabled individual whose benefits are denied or terminated and must withstand many months without his or her disability benefits. However, as the average DI benefits are very modest, it is reasonable to expect that the average disabled worker will have, at most, a home, with mortgage, and an automobile.

20/ This Court should note that the delays do not end when the claimant or beneficiary finally receives a favorable decision. The plaintiffs in Chagnon sought relief from excessive delays in SSA's implementation of favorable decisions. See also, Sharpe v. Harris, 621 F.2d 530, 531-2 (2d Cir. 1980).

Often the resources which the disabled person is forced to sell or relinquish, once benefits are terminated or denied and delay ensues would not even be considered in determining if he/she would meet the resource test in the SSI program. For example, 42 U.S.C. §1382b (a)(1) excludes the full value of a person's home for SSI purposes.[21/]

[21/] The Congressional intent in enacting a total exclusion of the home was very clear: elderly and disabled people who have homes should not be forced out of their homes in order to receive SSI benefits. See Statement of Senator Clark ["I believe that we should try to encourage aged, blind and disabled persons to retain their homes. Most of these people worked long and hard for the homes they now enjoy. In practically all cases the home is their only major asset. They should not be forced to transfer it - after a lifetime of savings and work - in order to receive SSI. Congressional Record, p. 34546 (October 1, 1976)]; Senator Brooke ["To make a potentially eligible person ineligible for needed assistance because they have a nice home is truly unwarranted. To make them sell or move out of that home in order to be eligible is equally cruel and unjust..." Congressional Record, p. 34549 (October 1, 1976)]

Therefore, in assessing the financial need of disabled individuals faced with delays in obtaining appeal decisions, it is not appropriate to add in, as if they can or should be easily liquidated, the value of basic resources, such as the person's home.

Unfortunately, average benefit statistics do not sufficiently convey the human consequences when benefits are lost and excessive delays precede their restoration. In recent years, the press has repeatedly recounted the costs to the disabled of erroneous decision-making followed by delays in the appeals process.[22/] Two examples demonstrate the problems:

> "Olga Roy underwent 30 operations in the 1970s. Surgeons operated on her heart, back and intestines, removed a kidney and a cancerous pancreas.

22/ See citations for fn. 53, infra.

"The health problems forced the 49-year-old Mount Prospect woman to quit jobs as a school bus driver, butcher and waitress. Social Security declared her disabled in 1977 and she lived for a time on a $297 monthly government check.

"But in June 1981, the government ruled her ineligible for disability benefits and told her to get a job.

"Roy sold her funiture, moved in with relatives and appealed the decision. This September, after Roy had gone 15 months without disability benefits, a judge declared her disabled after all.

...'I sold my car and every piece of furniture I owned,' Roy said. She left her rented apartment and moved in with her family. 'I became a nomad. I had to go wherever someone could take me.'"23/

* * *

[Robert Wilson, a fifty-four year old former truck driver had undergone open heart surgery twice since he applied for DI benefits and was denied. He had been waiting 16 months when the following was written:]

"Last week the bank repossessed Wilson's truck and

23/ Doyle, "Crackdown on disability aid, 'a disgrace,' The Sunday Herald (Illinois), page 1, 9 (January 2, 1983).

> the power company shut off the gas to heat the family's suburban brick home.
>
> "'We have borrowed from family, friends, anyone we could,' said Helen Wilson. 'Right now, we owe about $15,000.' She said the couple's charge cards are at their limit.
>
> "'The only thing we can hope to do is try to sell the house and pay back all the people what we owe,' said Wilson, who drove 18-wheel trucks for 31 years."24/

While severe economic loss and destitution alone should establish the DI appellants' interest in timely hearings, available information shows other severe harms: the physical and mental condition of DI recipients whose benefits are terminated deteriorate while they wait out the lengthy appeal process. Some die from their impairments. Others kill themselves. For example, Senator Metzenbaum

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24/ Downing, "Purging of Disability Rolls Multiplies Financial Worries," Commercial Appeal, May 31, 1982.

reported his office's knowledge of thirty-two deaths of disabled individuals due to their disabling conditions after the Secretary had terminated benefits:

> "The situation has reached a crisis point. My staff has documented at least 32 deaths of persons who were told by SSA that their benefits were being terminated because they were no longer disabled and who then died shortly thereafter of their disabling condition." Congressional Record, p. S 13853 (September 3, 1982)25/

In September 1982, the Los Angeles Times reported on eleven deaths:26/

> "All but one of the 11 people who died had filed appeals seeking reinstatement of benefits... Thomas A. Alvey,

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25/See also, "Benefits OK'd a Week After He Died," Philadelphia Daily News, page 6 (December 10, 1982); "Disabled: What Happens When Uncle Sam Says You're OK?" Akron Beacon Journal, page D1 (July 11, 1982).

26/"11 Denied Social Security Disability Die of Illnesses," Los Angeles Times, page 1 (September 17, 1982).

> 47, of La Habra (Calif.]: He died August 16 of heart disease six months after he had been declared fit for work and no longer eligible for disability benefits. After his benefits were cut off, the former supermarket manager was forced to subsist on a $81.67 monthly stipend and help from his mother, whose only income was from Social Security."

Still others have found the stress of the long period without benefits to be too overwhelming and have committed suicide. For example:

> "Unfortunately, this bill comes too late for Evelyn Mattson of Arizona, a 60-year-old woman with a seventh grade education who had worked up until 1978 as an assembler, packer and inspector in a plastic factory. Ms. Mattson took her life 2 days before an appeal reversal decision [arrived] in the mail. In her suicide note addressed to her daughter she wrote:
>
> 'I never wanted to get old and not be able to care for myself and I can see it coming. I'm sure now I won't get my disability...'"

Statement of Senator Levin, Congressional Record, pp. S 15103-4 (December 11, 1981).[27]

The Social Security Administration has recognized that suicides have become a major problem in the program. It has developed policy guidelines instructing staff in the steps to take when an applicant or beneficiary threatens to

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[27] See also, "He lost his disability pay, then lost his ability to live: Cutoff of man's benefits linked to suicide," Los Angeles Herald Examiner, pp. A-3, 16 (December 31, 1982) [benefits terminated September 1981; disabled appellant committed suicide, April 1982; ALJ reversed termination, September 1982]; Statement of Senator Sasser, Congressional Record, p. S 7289, (June 22, 1982), reporting on the suicide of a constituent terminated from the DI rolls; Statement of Senator Heinz, Congressional Record, p. S 5215 (April 26, 1983) ["...the CDI reviews are literally pushing people to the brink of death, through despair and suicide. These are not people who suffer from mild mental problems. They are chronically mentally ill people who would be in public mental institutions if the times were different."]

commit suicide.[28/]

In sum, the costs to the disabled individual of delay in the appeals process are overwhelming: loss of income and severe emotional stress, often having a negative impact upon the person's physical and mental impairments. It is from the perspective of the disabled worker faced with lengthy delays that the Court should also consider how fallable the current decision-making structure is in the DI program.

28/ "Pension Unit Issues Policy on Suicides: Social Security Rules Stress Care on Threats Made by People Denied Benefits," New York Times, page 19 (May 8, 1983).

II. The federal courts, the Congress, and the press have examined the Secretary's policies and found them to be harsh, unfair, and in many cases, illegal.

In 1980, the Congress passed legislation requiring the Secretary to review the cases of DI beneficiaries once very three years if they are not determined to have a "permanent" disability. §311(a), P.L. 96-265; 42 U.S.C. §421(h)(1). The statute mandated the reviews to begin on January 1, 1982. §311(b), P.L. 96-265.

The Secretary did not wait until that date. Instead, the "continuing disability investigations" ("CDIs") were accelerated and began in March 1981. "Even normally dry statistics on what has happened speak with rare clarity and passion."[29/] SSA performed 180,000 CDI reviews in the remainder of FY 1981,

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29/ Statement of Senator Levin, Congressional Record, p. S 13861 (December 3, 1982).

497,000 in FY 1982, and had performed 337,000 in FY 1983, as of May 1983.[30] During that period 374,000 disabled beneficiaries were terminated from the program.[31] Hundreds of thousands more await CDI review in the next eighteen months and face similar termination prospects. With the increased number of terminations will come increasingly high numbers of appeals. The disabled therefore also face the prospect of even greater delays at the ALJ level of appeal.[32]

30/ Statement of Paul B. Simmons, Deputy Commissioner of Social Security, Oversight Hearing on Social Security Disability Insurance Program, Select Committee on Aging, U.S. House of Representatives, page 4 (June 20, 1983).

31/ Id.

32/ There were 320,000 requests for ALJ hearings in FY 1982. (App. Br. p. 7) "The vast majority of these hearing requests were disability cases. HHS has projected that hearing requests will

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Various committees of the Congress have held hearings investigating a variety of problems faced by beneficiaries in the CDI reviews.[33/] Representative

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reach 379,000 in fiscal year 1983. This increase will result in part from the requirement imposed by Congress in 1980 that the Secretary provide for a periodic review of the eligibility of individuals who are receiving disability benefits." (Footnotes omitted) Id.

33/ See, for example:

"Social Security Appeals and Case Review Process," Hearings before the Subcommittee on Social Security of the Committee on Ways and Means, Serial 97-31 (October 23 and 28, 1981);

"Possible Irregularities in Medical Examinations Purchased from 'Volume Providers' for the Social Security Disability Program," Hearing before the Subcommittees on Social Security and Oversight of the Committee on Ways and Means, Serial 97-55 (March 11, 1982);

"Disability Admendments of 1982," Hearings before the Subcommittee on Social Security of the Committee on Ways and Means on H.R. 5700, Serial 97-54, (March 16 and 17, 1982);

"Administration's Fiscal Year 1983 Legislative Proposals for Unemployed Compensation and Public Assistance,"

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Hearings before the Subcommittee on Public Assistance and Unemployment Compensation of the Committee on Ways and Means, Serial 97-62 (March 25, April 21 and 22, 1982);

"Social Security Disability Insurance Program Cessations and Denials," Select Committee on Aging, U.S. House of Representatives, Committee Print 344 (May 1982); and "Impact of Accelerated Reviews on Terminations and Denials," Committee Print 345 (May 1982);

"Oversight of Social Security Disability Benefits Terminations," Hearing before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate (May 25, 1982);

"Social Security for Mentally Disabled," Hearing before the Special Committee on Aging, United States Senate (May 1983);

Hearing on Problems in the Social Security Review Process, Hearing before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate (June 1983);

"Social Security Disability Review: A Federally-Created State Problem," Select Committee on Aging, U.S. House of Representatives [hearing in Washington, D.C. June 1983; four field hearings, 1983];

Hearing on the Problems in the Social Security Disability Program, Social Security Subcommittee, Ways and Means Committee, U.S. House of Representatives (June 30, 1983); and

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J.J. Pickle, Chair of the Social Security Subcommittee of the Ways and Means Committee and the sponsor of legislation to correct many of the problems, H.R. 3755, stated:

> "Unfortunately, a hasty and harsh implementation of one provision of the 1980 Amendments, that calling for a review of disabled beneficiaries at least once every three years, has magnified problems in the program a thousand fold and caused much pain for beneficiaries and much dislocation among agency personnel."34/

The problems "magnified" by the CDI process are, with very few exceptions,35/

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Hearing on Disability Issues in the Supplemental Security Income program, Subcommittee on Public Assistance and Unemployment Compensation, Committee on Ways and Means, U.S. House of Representatives (August 3, 1983).

34/ Opening Statement of Representative Pickle at the Hearing on Social Security Disability Insurance Program before the Social Security Subcommittee of the Ways and Means Committee, page 2 (June 30, 1983).

35/ The issue of whether the Secretary must have evidence of medical improvement before terminating benefits is not applicable to the initial applicant.

the same problems faced by the disabled individual applying for DI benefits. The sharp increases in terminations have been matched by decreases in allowances of applications. "The number of awards in 1981 was approximately the same as the 1970 figure, despite a 34-percent increase in the population insured by disability. As a result, the award rate in 1981 - 357 per 100,000 workers - fell far short of the 480-per-100,000 figure in 1970. In fact, the 357 awards per 100,000 in 1981 was by far the lowest rate in the history of the DI program.[36] In FY 1976, the denial rate at the initial application stage was 41.6%. Just six years later, in FY 1982, the Secretary denied 65.1% of the disability applications at the initial level.[37]

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[36] Lando, Farley and Brown, "Recent Trends in the Social Security Disability Insurance Program," Social Security Bulletin, Vol. 45, No. 8, pp. 3, 9 (August 1982).

[37] "Key Workload Indicators, FY '83," (May 1983) page 15.

The problems documented undermine all confidence in the quality and validity of the decisional process utilized by the Secretary. They make a mockery of the Secretary's representations to this Court that the delays are the "direct and foreseeable consequence - of the conscientious implementation of the Social Security Act..." [App. Br. p. 33.] The Congressional hearings have focused on a wide variety of serious problems. Problems include the Secretary's failure to: obtain all needed evidence prior to making a decision,[38] require that there be evidence of medical improvement before a person's benefits can be terminated;[39]

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[38] See, for example, "Oversight of Social Security Disability Benefits Terminations," Hearing before the Subcommittee of Government Management of the Committee on Governmental Affairs, U.S. Senate (May 25, 1982).

[39] See, for example, "Social Security Disability Insurance Program - Cessations and Denials," Select Committee on Aging, U.S. House of Representatives, Committee Print 344 (May 1982).

properly evaluate the impairments of the mentally ill in determining initial eligibility or continued disability;[40] consider the effects of pain in evaluating disability;[41] obtain and fully consider the medical opinions of the disabled beneficiaries' treating physicians;[42] follow decisions of the Circuit Courts of Appeals in other cases raising the same issue within the same circuit;[43] properly utilize the Administrative Procedure Act, 5 U.S.C. §553, in amending or issuing policy changes in the DI

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[40] See, for example, "Social Security for the Mentally Disabled," Special Committee on Aging, U.S. Senate (May 1983).

[41] See footnote 38, supra.

[42] Id.

[43] Id., see also "Disability Amendments of 1982," Hearings before the Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Representatives, Serial 97-54 (March 16 and 17, 1982).

program;[44] and properly regulate the use of consultative examiners while encouraging excessive reliance upon their opinions in determining if a person is disabled.[45]

The Courts of Appeals and the district courts have struck many of the Secretary's practices on the grounds that they violate various provisions of the Social Security Act.[46] In Mental

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[44] See footnotes 38, 40 and 43, supra.

[45] See footnote 40; see also, "Possible Irregularities in Medical Examinations Purchased from 'Volume Providers' for the Social Security Disability Program," Hearings before the Subcommittees on Social Security and Oversight of the Committee on Ways and Means, Serial 97-55 (March 11, 1982); letter of the General Accounting Office to Senator Metzenbaum, June 10, 1983, regarding "SSA Needs to Protect Against Possible Conflicts of Interest in Its Disability Programs" (GAO/HRD-83-65).

[46] In most cases, an individual has obtained the decision against the Secretary. Some of the decisions benefit state or region-wide classes. The

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Health Association of Minnesota v. Schweiker, 554 F.Supp. 157 (D.Minn. 1982), appeal pending 8th Circuit, the district court held that the Secretary was not properly evaluating the impairments of the mentally disabled, and that her policy was "arbitrary, capricious, irrational, and an abuse of discretion." 554 F.Supp. at 166. The court also held that the policy violated the APA, 5 U.S.C. §553, in that the policy was never published in the Federal Register and was instead issued through various policy memoranda and quality assurance returns

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Secretary does not feel obliged to follow Circuit Court of Appeals decisions with which she disagrees, except in the individual case. See discussion at footnotes 40 and 48. As a result and because no nationwide classes have been sought, circuit and district court opinions favorable to the plaintiff should not be construed by this Court to indicate that the quality of decision-making has improved nationally as a result of these suits.

to states in individual cases. 554 F. Supp. at 160-165, 166.[47]

District courts have required the Secretary to follow precedential Circuit Court decisions in which she had either "non-acquiesced" or which she had simply chosen to ignore.[48] Some circuit

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[47] See also, "Passing the Buck: Federal Efforts to Abandon the Mentally Disabled," A Report of the Office of the City Council President, New York City, 1982. Similar types of charges have been raised about the manner in which the Secretary evaluates specific physical impairments. See, for example, State of New York v. Heckler, 83 Civ. 5903 (S.D. N.Y. filed August 10, 1983) [challenging the Secretary's standards utilized in evaluating cardiac impairments]; Testimony of Floyd A. Davis, M.D., Director, Multiple Sclerosis Center, Rush-Presbyterian-St. Luke's Medical Center, on behalf of the National Multiple Sclerosis Society before the Social Security Subcommittee of the Ways and Means Committee, June 30, 1983 [discussing the inadequacy of the Secretary's standards for evaluating multiple sclerosis.]

[48] See Siedlecki v. Schweiker, Civil Action No. 82-61R (W.D.Wash. 1983);

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courts have expressed their surprise at the Secretary's failure either to follow their decisions or to appeal to this Court.[49/] Numerous courts have held

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Chee v. Schweiker, No. Civ.-82-693 PCT-VAC (D.Ariz. 1982); Morrison v. Heckler, Civil Action No. C 82-888V (W.D.Wash. 1983); Lopez v. Heckler, No. 83-0697-WPG[T] (C.D.Cal. June 16, 1983), appeal pending in the Ninth Circuit; stay granted on one portion of the district court's order, No. A-145 (Justice Rehnquist, September 9, 1983). The courts in Siedlecki and Chee require the Secretary to follow Finnegan, fn. 50, infra. Lopez requires the Secretary to follow Finnegan and Patti within the jurisdiction of the Ninth Circuit. Pursuant to the Morrison order, in the State of Washington, the Secretary must follow Patti; Griffis v. Weinberger, 509 F.2d 837 (9th Cir. 1975) [proper evaluation of alcoholism]; Day v. Weinberger, 522 F.2d 1154 (9th Cir. 1975); and Rhodes v. Schweiker, 660 F.2d 722 (9th Cir. 1981) [Day and Rhodes address the Secretary's failure to provide proper weight to the evidence submitted by the disabled individual's treating physician.]

49/ For example, in Nelson v. Heckler, CCH Unemp. Ins. Rptr. ¶14,684 (8th Cir. July 26, 1983), the court found error in the Appeals Council's failure to fully consider the claimant's testimony

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either that (a) the Secretary cannot terminate benefits without evidence of medical improvement or without evidence that the original decision was clearly erroneous, or (b) once a person is found by the Secretary to be disabled, there is a presumption that he remains disabled.[50]

The General Accounting Office (GAO) has expressed similar concerns and reached similar conclusions about

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regarding pain, citing four earlier decisions of the Eighth Circuit which were directly on point. The court then stated, "For some unexplained reason, the Secretary insists upon ignoring this Court's statements with respect to the proper evaluation of pain."

50/ See, for example, Miranda v. Secretary of Health, Education and Welfare, 514 F.2d 996 (1st Cir. 1975); Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982); Trujillo v. Heckler, Civil Action No. 82-K-1505 (D. Colo. August 16, 1983); Finnegan v. Mathews, 641 F.2d 1340 (9th Cir. 1981); Kuzmin v. Heckler, No. 82-5705 (3d Cir. August 18, 1983). Finnegan and Kuzmin address the medical improvement issue in the SSI context.

the Secretary's actions. In response to a request from Senator Heinz, the GAO investigated SSA's policies and procedures for determining the eligibility of mentally impaired persons. The GAO reported:

> Our review revealed several weaknesses in SSA's and DDS's adjudicative policies and practices. Specific weaknesses we identified were:
>
> (1) an overly restrictive interpretation of the criteria to meet SSA's medical listings, resulting principally from narrow assessments of individuals' daily activities;
>
> (2) inadequate development and consideration of a person's residual functional capacity and vocational characteristics;
>
> (3) inadequate development and use of existing medical evidence, resulting in an over-reliance and misuse of consultative examiners; and
>
> (4) insufficient psychiatric resources in most state DDSs.51/

51/ Statement of Peter J. McGough, Office of Program Planning, General Accounting Office, before Senate Special Committee on Aging, April 7, 1983, reprinted in the Congressional Record, pp. S 5216-5220 (April 26, 1983).

The GAO also reviewed 40 decisions where SSA had issued termination or denial notices to mentally impaired individuals and concluded that SSA's judgment was incorrect in 27 cases. In the remaining 13, GAO found that more information should have been obtained before an informed decision could be made:

> ...[W]e found many individuals who had their benefits terminated despite having severe impairments, and in our opinion, having little or no capability to function in a competitive work environment. We had 40 of the denial and termination cases reviewed by our clinical psychologist and she concluded that in 27 of the cases the individuals could not work in a competitive or stressful environment. In an additional 13 cases she concluded that more medical or psychosocial information or trial work experiences were needed to make an informed decision.52/

The press has published numerous articles which document the connection

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52/ Id. at S 5217.

between these policies and procedures, the overwhelming numbers of incorrect terminations, and the human suffering which resulted when the disabled person's appeal was stalled, along with hundreds of thousands of others, in the administrative process.[53/] Numerous editorials

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53/ Numerous articles documenting the suffering of disabled beneficiaries who SSA has terminated have appeared in the press. See, for example, "Shame! Death by regulation and other Social Security tragedies," The Boston Phoenix (January 26, 1982); "Disability Purge Ruinous to Many," Los Angeles Times, page 1 (March 21, 1982); "Through the Safety Net," Philadelphia Inquirer, page 1-A (March 21, 1982); "Cuts in U.S. Aid to Disabled Lead to 'Horror Stories,' Panel Told," Los Angeles Times, page 1-3 (April 9, 1982); "'Purge' of Disabled from Benefit Rolls Alleged at Hearing," Daily Journal, page 1 (April 9, 1982); "Fairness of Reagan's Cutoffs of Disability Aid Questioned," New York Times, p. 1 (May 9, 1982); "Disabled: What happens when Uncle Sam says you're OK?" Akron Beacon Journal, page D1(July 11, 1982); "Congress Considers Revising Review Procedures for Disability Payments to Aid the Beneficiaries," Wall Street Journal, page 48 (August 18, 1982); "Disability: Question of benefit

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eligibility leaves thousands in limbo," The Sunday Gazette-Mail (W.Va.), page 1E (August 29, 1982); "U.S. Gets Tough with Disabled: Eligible Recipients Losing Out," Washington Post, page 1 (September 7, 1982); "Bill Promised to Curb Disability Cutoff Abuses," Los Angeles Times, page 5 (September 19, 1982); "Unjust Social Security Cutoffs Laid to State," The Boston Globe (October 6, 1982); "Wheelchair-bound: Appeal drags on for disabled woman whose checks were cut off," Richmond News Leader, page 1E (October 18, 1982); "Poor, disabled suffer budget-cut hardships," News-Press (Santa Barbara, Calif.), page B1 (October 26, 1982); "Survival: The System v. Walter Davis," Philadelphia Daily News, page 4 (November 11, 1982); "Social Security Cutbacks Border on Terrorization," Southwest Times Record (Fort Smith, Arkansas), (November 14, 1982); "Social Security cutoffs criticized: Citing disabled, GAO faults wholesale terminations," Philadelphia Inquirer (December 14, 1982); "Social Security Told to Restore Mentally Ill Benefits: Judge Rules Cutoff Standards Faulty in Midwest," Washington Post (December 24, 1982); "Many in need losing Social Security disability benefits," The Day (New London, Connecticut) (January 2, 1983); "Social Security: A Systematic Breakdown; Social Security's a Little Short of Heart, Too," Philadelphia Daily News (February 16, 1983); "In the New Rush for Budget Savings, A Life is Trampled," Washington Post, page 3 (May 27, 1982); "Prattville Woman Wages War on Social Security Agency," The Alabama Journal (June 28, 1983); U.S. 'stress test' adds to trouble of heart patients," St. Petersburg Times (July 10, 1983); "The Disability Nightmare," Newsday (March 21, 1983).

document the intensity of both the human suffering and the public outcry at the heartlessness and illegality of the Secretary's policies.[54/]

The Secretary's brief portrays an image of the disability insurance system which contrasts sharply with this persistent criticism and concern over its operation since early in 1981. The brief is, in

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[54/] Editorials have consistently decried the unfairness of the Secretary's policies and the consequences for disabled individuals left without benefits while they appeal. See, for example, "Cut,Cut... Think, Think," Los Angeles Times (March 25, 1982); "Safety Net Shrinks," Commercial Appeal (Tennessee) (June 5, 1982); "Taking up cause of the disabled," Seattle Post-Intelligencer, page A8 (June 28, 1982); "Wielding ax is no way to trim disability rolls," Philadelphia Inquirer, page 8A (September 18, 1982); "Questioning disability decisions," The Boston Globe, page 14 (October 14, 1982); "Protect rights of disabled," Philadelphia Inquirer, page 14-A (June 7, 1983); "Plight of the Disabled," Los Angeles Times, page II-6 (June 9, 1983); "Disability review changes: 'By no means a solution,'" Philadelphia Inquirer, page 22-A (June 9, 1983); "Not Fair Enough for the Disabled," New York Times, page A22 (June 14, 1983).

fact, inconsistent with Secretary Heckler's recent observation that the CDI reviews have resulted "in hardships and heartbreaks for innocent and worthy disability recipients who would fall through the cracks of the existing long-time, paper-oriented review process that had never before had to cope with such an overwhelming workload."[55/] Secretary Heckler's public statements also support amici's position that this Court can no longer rely upon the "fairness and reliability of the existing pretermination procedures," Mathews v. Eldridge, 424 U.S. 319,343 (1975). She has publicly stated that the system is "too insensitive, too bureaucratic. Mistakes were too easy to make -- and too hard to rectify." (emphasis added.)[56/]

[55/] "Statement of Margaret M. Heckler, Secretary of Health and Human Services," HHS News Release, page 3 (June 7, 1983).

[56/] Id.

Unlike the data available at the time of the Eldridge decision, there is now a well-developed body of research, hearings, and litigation which conclusively establishes the horrible truth of Secretary Heckler's words. The current system is not designed to encourage, much less assure, accurate decision-making. In the context of the hardships faced by DI claimants and beneficiaries who attempt to cope while "left to drift"[57/] as they await appeals decisions (see Section I, supra), this failure to provide accurate decisions dictates a reading of the term "reasonable" in §205(b) which may require even shorter time frames than those imposed by the district court. Further, this failure to provide accurate decisions is contrary to the Secretary's argument to this Court that "it is

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[57/] Senator Armstrong, see fn. 4, supra.

simply inconceivable" that anything but the current processing times would be required of her because these delays "are such an entrenched feature - and direct and foreseeable consequence - of the conscientious implementation of the Social Security Act by Congress and the Secretary..." [App. Br. p. 33]. Nothing in the legislative record reflects that the Congress contemplated the high degree of inaccuracy nor the impact which the delays would have upon disabled people's lives. The Congress' reactions are discussed further in Part III.

III. The district court's exercise of its equitable power in fashioning the relief was appropriate, necessary, and is consistent with the Congress' own actions in addressing the severe consequences of SSA's administrative delays.

The purpose of this Section is to put in perspective the district court's exercise of its equitable powers to fashion a remedy in light of the Congress'

own actions in this area. In addition to the many Congressional hearings, numerous bills have been introduced in this Congress to make major reforms in the disability determination process.[58] Further, late in 1982, Congress passed H.R. 7093, now P.L. 97-455, which provides that benefits will be continued through the ALJ level of review.[59]

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[58] See, for example, H.R. 2987 (introduced by Rep. Shannon, member Social Security Subcommittee, Ways and Means Committee); H.R. 3755 (introduced by Rep. Pickle, chair of the Social Security Subcommittee, after mark-up by the Subcommittee in July 1983); S. 476 (introduced by Senators Levin and Cohen).

[59] The Secretary attempts to minimize this legislation because it is "temporary." (App. Br. p. 49) The benefit of Section 2 is only available to those terminated prior to October 1, 1983 and, then, benefits cannot be received after June 1, 1984, even if the ALJ decision has not been issued. Legislation pending in both the House (H.R. 3755) and Senate (S. 476) would amend the Act to provide for continued benefits through the ALJ level in Title II cases. H.R. 3755, sponsored by Rep. Pickle, Chair of the

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The Secretary mistakenly argues that the Congress "has not chosen to authorize the payment of interim benefits solely because of the passage of time in processing claims for disability benefits." (App. Br. p. 18) While it is true that interim payments are not payable under 42 U.S.C. §405(g)(5) to disabled individuals, the Secretary's sweeping statement effectively ignores the fact that in 1982, in response to high numbers of erroneous terminations and lengthy appeal times, the Congress provided that Title II recipients can continue to receive their benefits while they appeal, through the ALJ level. P.L. 97-455, Section 2, 42 U.S.C. §423(g).

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Social Security Subcommittee of the Ways and Means Committee, was reported out by the Subcommittee in July 1983 and is awaiting imminent consideration by the full Committee.

The Congressional debate of this bill reflects that "passage of time" was central to the members' concerns. Senator Metzenbaum specifically noted the "long appeal process":

> "The tragedy is that while two-thirds of those who appeal their termination decisions eventually have their benefits restored by an administrative law judge, they are often left with no other source of income during this long appeal process. Of the 32 deaths, in almost every case a surviving relative, the treating physician, or some other interested person has stated their belief that the wrongful termination decision and resulting loss of benefits was a contributing factor in the person's death." (emphasis added)
>
> Congressional Record, p. S 13853 (December 3, 1982)

Senator Boren, a member of the Finance Committee, stated:

> "Cutting off someone's disability benefits before he's had a chance for a full hearing is sort of like declaring someone guilty before they are proven innocent. We should not penalize those with true need

> because of bureaucratic backlogs. I am the first one to want to reduce Federal spending, but it is not right to use Government delays to deny funds to those who are truly helpless for physical reasons." (emphasis added)
>
> Congressional Record, p. S 13855-6 (December 3, 1982).

Similarly, Senator Cohen, chair of the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, which has held two extensive hearings investigating the DI crisis, stated:

> "The tragedy is that, in waiting for reinstatement, these severely disabled persons and their families must go without benefits for months - or even a year or more - due to the tremendous backlog of appeals. (emphasis added)
>
> Congressional Record, p. S 13856 (December 3, 1982)

Senator Heinz, a member of the Finance Committee and chair of the Senate Special Committee on Aging which has held extensive hearings on SSA's

treatment of the mentally impaired, stated:

> "[This] bill means that for the immediate future, at least, individuals who have been wrongfully terminated will not be financially ruined because they have been deprived of their benefits during a lengthy appeals process. I have seen in my own State of Pennsylvania and elsewhere across the country - where individuals have lost their homes and sustained other financial damages because they were deprived of their benefits during a long appeals process which resulted in a determination that they never should have been kicked off the rolls at all." (emphasis added)
>
> Congressional Record, p. S 13857 (December 3, 1982)

Senator Pryor, a member of both the Finance Committee and the Special Committee on Aging who held hearings on DI issues in his home state of Arkansas, stated:

> "Testimony at the hearing was heard from several witnesses who have had their benefits terminated and eventually reinstated. The lengthy appeals process that these individuals must endure can take anywhere from 6 to 18

> months during which the beneficiary may be receiving no income and suffering from great financial, emotional, and physical strain." (emphasis added)
>
> Congressional Record, p. S 13862 (December 3, 1982)

Senator Robert Byrd also referred to lengthy delays, describing the months as "this waiting period limbo:"

> The waiting period for a review of the termination decision can be as long as a year. And, for many people - who are without other income - this is simply too late. Seriously ill people are forced to sell their homes or take other desperate, irreversible actions. Regrettably, most of us in this body have heard of suicides by individuals who grew terribly despondent during this waiting period limbo. Other people have actually died from their disability during this time." (emphasis added)
>
> Congressional Record, p. S 13867 (December 3, 1982)

Senator Levin, ranking minority member of the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, who along with

Senator Cohen conducted two hearings investigating the DI crisis and who is the co-sponsor of S. 476, earlier explained his interest in a similar provision included in another bill:

> Mr. President, my proposal parallels the right of continuing disability benefits presently afforded SSI Disability recipients. Many title II disability insurance beneficiaries are also living at subsistence level and the loss of benefits during appeal has proven to be devastating. What financial security these people have come to realize is virtually destroyed during the appeal period between termination and restoration of benefits. The restored benefits, in over 70 percent of the appealed cases - many times 6 to 12 months later, come too late to stop a foreclosure or eviction, or lessen the emotional trauma which has driven some to such a severe and chronic state of nervous anxiety that they have taken their own lives. (emphasis added)
>
> Congressional Record, p. S 15104 (December 11, 1981)

Therefore, in requiring that the Secretary make interim payments to

claimants who did not receive timely administrative action, the lower courts' actions were consistent with recent Congressional policy in recognizing the harms occasioned by lengthy delays.

CONCLUSION

For all of the reasons outlined above, and those set forth in appellees' brief, amici urge affirmance of the decision of the Second Circuit Court of Appeals.